(2)

Supreme Court, U.S.
FILED
MAR 26 2004
OFFICE OF THE CLERK

No. 03-1214

In the Supreme Court of the United States

ALLSTATE CORPORATION, *et al.*,

Petitioners,

v.

JOSE C. DEHOYOS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
STEPHANIE A. MARTZ
National Chamber Litigation Center, Inc.
1615 H Street
Washington, D.C. 20062
(202) 463-5337

ALAN E. UNTEREINER*
BRIAN M. WILLEN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT 2

A. The McCarran Act 2

B. This Court's Decision in *Humana* 4

C. The Proceedings Below 6

INTRODUCTION AND SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. The Fifth Circuit's Decision Ignores The Teachings Of *Humana* 9

II. This Case Represents An Ideal Vehicle For Resolving Issues Left Open In *Humana* And Clarifying The Scope Of The McCarran Act 12

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases:

Am. Chiropractic Ass'n, Inc. v. *Trigon Healthcare, Inc.*, 151 F. Supp.2d 723 (W.D. Va. 2001) 18

BMW of N. Am., Inc. v. *Gore*, 517 U.S. 559 (1996) 16

Barnett Bank of Marion County v. *Nelson*, 517 U.S. 25 (1996) 12, 19

Cipollone v. *Liggett Group Inc.*, 505 U.S. 504 (1992) ... 16

Colorado Interstate Gas Co. v. *FPC*, 324 U.S. 581 (1945) 19

Fidelity Federal Savings & Loan Ass'n v. *de la Cuesta*, 458 U.S. 141 (1982) 12

Geier v. *American Honda*, 529 U.S. 861 (2000) 12

Group Life & Health Ins. Co. v. *Royal Drug Co.*, 440 U.S. 205 (1979) 4, 20

Hooper v. *California*, 155 U.S. 648 (1895) 2

Humana, Inc. v. *Forsyth*, 525 U.S. 299 (1999) ..... *passim*

In re Managed Care Litigation, 185 F. Supp.2d 1310 (S.D. Fla. 2002), 150 F. Supp.2d 1330 (S.D. Fla. 2001) 17

LaBarre v. *Credit Acceptance Corp.*, 175 F.3d 640 (8th Cir. 1999) 18

Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) .. 3

TABLE OF AUTHORITIES – Continued

Page(s)

Moore v. *Liberty Nat'l Life Ins. Co.*,
267 F.3d 1209 (11th Cir. 2001) 10

NAACP v. *American Family Mut. Ins. Co.*,
978 F.2d 287 (7th Cir. 1992) 10

Nationwide Mut. Ins. Co. v. *Cisneros*,
52 F.3d 1351 (6th Cir. 1995) 10

Northwest Airlines, Inc. v. *County of Kent*,
510 U.S. 355 (1994) 20

Perez ex rel. Perez v. *Blue Cross Blue Shield of Texas, Inc.*, 2003 WL 22964281
(Tex. Ct. App. Dec. 18, 2003) 15

Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946) 4

SEC v. *National Securities, Inc.*, 393 U.S. 453 (1969) .. 3, 4

St. Paul Fire & Marine Ins. Co. v. *Barry*,
438 U.S. 531 (1978) 3, 4

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 6

United States v. *South-Eastern Underwriters Ass'n*,
322 U.S. 533 (1944) 3

Wineinger v. *United Healthcare Ins. Co.*,
2000 WL 1277629 (D. Neb. Feb. 16, 2000) 18

Statutes:

15 U.S.C. § 1011 3

TABLE OF AUTHORITIES – Continued

Page(s)

15 U.S.C. § 1012(a) 4

15 U.S.C. § 1012(b) ..... *passim*

Fair Housing Act, 42 U.S.C. § 3604 6

McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* 2

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) 4-5, 12

Tex. Ins. Code art. 21.21-6 ..... 14, 15

Tex. Ins. Code art. 21.49-2U 14

Tex. Ins. Code art. 82.001-83.153 15

Miscellaneous:

BLACK'S LAW DICTIONARY (6th ed. 1990) 5

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States ("the Chamber"), a non-profit corporation organized under the laws of the District of Columbia, is the largest federation of business, trade, and professional corporations in the United States. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every geographic region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

This is such a case. The proper interpretation of the McCarran-Ferguson Act, which was enacted to prevent inadvertent federal regulation of insurance that impairs the comprehensive regulation already imposed by the States, is important to the continued vitality of the insurance industry and therefore to the business community as whole. Beyond that, this case raises the important question whether disparate impact claims under the Fair Housing Act (and, by extension, other generally applicable federal civil rights statutes) may be used to challenge, and collaterally attack, insurance companies' use in the underwriting process of facially neutral, actuarially sound, risk-related criteria – including criteria, such as credit history, that have been specifically authorized by state insurance regulators.

---

[1] The parties' letters of consent to this filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, the Chamber states that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

The fact that a divided panel of the Fifth Circuit, over Judge Jones's vigorous dissent, permitted such claims to proceed in a *putative nationwide class action* only heightens the importance of this case to the business community. Class-action lawsuits, which use procedures and seek remedies that are typically unavailable under state insurance schemes, have been the subject of abuses in recent decades and are of particular concern to the Chamber's members.

This case also raises broader issues about the risk of allowing lay juries to second-guess and reevaluate the rate-making judgments of expert regulators. Litigation such as this impermissibly elevates juries into super-actuaries, inviting federal judges and jurors to use general federal statutes not directed at the insurance business to usurp regulatory functions properly reserved to state legislatures and insurance commissions. This process erodes the important divisions of regulatory authority in our federal system that the McCarran-Ferguson Act was enacted to preserve. The Chamber's members, including those outside the insurance industry, have a substantial interest in preventing that unwelcome development.

STATEMENT

The case presents a question of surpassing importance concerning the meaning of the McCarran-Ferguson Act ("the McCarran Act"), 15 U.S.C. § 1011 *et seq.*, a statute passed by Congress in order to preserve the primacy of state authority over the business of insurance. The Fifth Circuit answered the question presented in a way that is wrong, inconsistent with this Court's decision in *Humana, Inc.* v. *Forsyth*, 525 U.S. 299 (1999), and at odds with the decisions of other circuits. Further review by this Court is needed.

A. The McCarran Act

Before 1944, this Court had "consistently held that the business of insurance was not commerce." *Humana*, 525 U.S. at 306; see, *e.g.*, *Hooper* v. *California*, 155 U.S. 648, 654 (1895). As a consequence, for the first century and a half after

the founding of the Republic the insurance industry was "largely immune from federal regulation." *Humana*, 525 U.S. at 306; see also *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 539 (1978) ("[T]he States enjoyed a virtually exclusive domain over the insurance industry."). Under this regime, "States had a free hand in regulating the dealings between insurers and their policyholders." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1969).

In 1944, this Court abruptly changed course, ruling that a fire insurance company that conducted a substantial part of its transactions across state lines was engaged in interstate commerce – and subject to the Sherman Act. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). This decision "provoked widespread concern that the States would no longer be able to engage in * * * effective regulation of the insurance industry." *Barry*, 438 U.S. at 539. In response, Congress "moved quickly" to "restore the supremacy of the States in the realm of insurance regulation" by enacting the McCarran Act in 1945. *Ibid.* Thus, the statute represented "an attempt [by Congress] to turn back the clock" and "to assure that the activities of insurance companies in dealing with their policy holders would remain subject to state regulation." *National Securities*, 393 U.S. at 458.

Congress sought to achieve these goals in two ways. First, Section 1 of the McCarran Act declares that "continued regulation and taxation by the several States of the business of insurance is in the public interest" and that "silence on the part of the Congress shall not be construed to impose *any* barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011 (emphasis added). This provision alleviated the concern that operation of the so-called "dormant" commerce power would prohibit any state regulation of the insurance industry. See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982) (dormant Commerce Clause applies only where Congress "has not acted or purported to act").

Second, and more important for present purposes, Congress provided in Section 2(a) that "the business of insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). Congress backed up this commitment to the primacy of state insurance law by broadly providing, in Section 2(b), that federal legislation not specifically related to the business of insurance shall not be "construed to *invalidate, impair, or supersede any* law enacted by *any* State for the purpose of regulating the business of insurance." *Id.* § 1012(b) (emphasis added). Section 2(b) thus "ensured that federal statutes not identified in the Act or not yet enacted would not automatically override state insurance regulation." *Humana*, 525 U.S. at 306.[2]

B. This Court's Decision in *Humana*

In *Humana* v. *Forsyth*, this Court examined the meaning of the critical, disjunctive terms of Section 2(b) of the McCarran Act: "invalidate," "supersede," or "impair." The case involved a private civil suit brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c). The suit charged a group health insurer with engaging in a pattern of fraud whereby it received discounts for

---

[2] In interpreting the McCarran Act, this Court has repeatedly looked to the history and purposes of the statute. See, *e.g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 429 (1946). It has also instructed that the Act should "be read as protecting the right of the States to regulate what they traditionally regulated" – in particular, what Congress regarded (and the statute referred to) as the "business of insurance." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 n.18, 221 (1979). The Court has "interpreted the term 'business of insurance' in § 2(b) broadly to encompass '[t]he relationship between insurer and insured, the type of policy which could be issued, [and] its reliability, interpretation, and enforcement.'" *Barry*, 438 U.S. at 550-51 (quoting *National Securities*, 393 U.S. at 460). "Certainly the fixing of rates is part of this business * * * ." *National Securities*, 393 U.S. 460.

hospital services that it did not pass on to its policy beneficiaries. The plaintiffs sought treble damages as a remedy.

This Court narrowly ruled that "RICO can be applied *in this case* in harmony with" Nevada's laws governing insurance. 525 U.S. at 303 (emphasis added). In reaching that conclusion, the Court examined the standard of conduct sought to be enforced, the procedural mechanisms, and the available remedies in the underlying RICO action, and compared them with those available under Nevada law. "The acts the policy beneficiaries identify as unlawful under RICO," the Court first explained, "are also unlawful under Nevada law." *Id.* at 308. In addition, the Nevada Unfair Insurance Practices Act not only sets forth an "administrative scheme that prohibits various forms of insurance fraud and misrepresentation" but also authorizes a "private right of action" in the courts for those injured by insurance fraud. *Id.* at 311-12. Similarly, Nevada *common law* imposes an independent duty on insurers to deal with their policyholders fairly and in good faith, and it permits plaintiffs who bring suits for insurance bad faith to recover punitive damages awards that are exempt from the usual Nevada cap of three times compensatory damages. *Id.* at 313. "Accordingly," the Court explained, "plaintiffs seeking relief under Nevada law may be eligible for damages *exceeding* the treble damages available under RICO." *Ibid.* (emphasis added).

In addition to carefully analyzing Nevada law and comparing it to RICO, the Court parsed the text of Section 2(b) of the McCarran Act. "[O]rdinarily," the Court noted, the "term 'invalidate' * * * means to *render ineffective*, generally without providing a replacement rule or law." 525 U.S. at 307 (emphasis added; internal quotations omitted). "'[S]upersede,'" on the other hand, "ordinarily means to displace (and thus render ineffective) while providing a substitute rule." *Ibid.* (internal quotations omitted). Finally, "impair" means "'to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.'" *Id.* at 309-10 (quoting BLACK'S LAW DICTIONARY 752 (6th ed. 1990)). The Court also drew

support from *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 102 (1983), a preemption case, which concluded that to "'impair' a law is to hinder its operation or 'frustrate [a] goal' of that law." 535 U.S. at 311. In light of this broad definition of "impair," the Court in *Humana* firmly rejected the notion that "impair[ment]" requires a direct conflict between the federal and state provisions. *Id.* at 309 (Congress did not intend "a green light for federal regulation whenever the federal law does not collide head on with state regulation").

Based on the foregoing analysis, the Court distilled the essence of Section 2(b) into this formula: "When federal regulation does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." 535 U.S. at 310. Applying this formulation, the Court concluded that there was "no frustration of state policy in *the RICO litigation at issue here*" (525 U.S. at 313 (emphasis added)), which sought to apply the same standard of conduct, in the same procedural setting (a private lawsuit), as Nevada law would provide, and which sought a remedy that was less than what a Nevada court (or jury) could award.

C. The Proceedings Below

1. This lawsuit was initiated by six individuals as representatives of a putative nationwide class of Allstate policyholders. Pet. 9-10 & n.11. Among other things, respondents alleged that petitioners Allstate Corporation and its subsidiaries (collectively, "Allstate"), had violated the Fair Housing Act ("FHA"), 42 U.S.C. § 3604, by using race-neutral credit-scoring programs in evaluating risk and determining the pricing of Allstate's homeowners' insurance policies. Pet. 9. Allstate's use of credit scoring, respondents alleged, had a disparate impact on non-Caucasians and thus amounted to illegal discrimination under the FHA. *Ibid.* Respondents sought a wide array of remedies, including a declaratory judgment that credit scoring is unlawful, preliminary and permanent injunc-

tive relief, reformation of existing insurance contracts, imposition of a constructive trust upon Allstate's "ill-gotten" gains, attorneys' fees, and punitive damages. C.A. ER 16-21.

Allstate moved to dismiss, contending among other things that the maintenance of respondents' disparate-impact claims under the FHA was precluded by Section 2(b) of the McCarran Act, 15 U.S.C. § 1012(b). Pet. 10. The district court denied the motion to dismiss. Pet. App. 24a-27a.

2. A divided panel of the Fifth Circuit affirmed. Pet. App. 1a-19a. In rejecting Allstate's argument that the McCarran Act precluded respondents' disparate-impact claims under the FHA, the panel majority faulted Allstate for supposedly failing to identify "any law with which the federal civil rights laws conflict" and "any declared regulatory policy which the application of these statutes would frustrate." Pet. App. 8a. The majority also characterized Allstate's argument as nothing more than a variant of "field preemption" (Pet. App. 10a, 11a), even though Allstate (and its supporting *amici*) had argued that the maintenance of respondents' disparate-impact claims would in multiple ways "interfere with" the administrative schemes in Texas, Florida, and other States that regulate the pricing of Allstate's policies.

In dissent, Judge Jones criticized the majority for "interpret[ing] the scope of McCarran-Ferguson preemption too narrowly" and for "misunderst[anding] the intimate connection between plaintiffs' claims and insurance rate-making," noting as well that "insulation of state regulation regarding the fixing of insurance rates from federal law" was "at the very core" of the McCarran Act. Pet. App. 15a, 18a; see note 2, *supra*. Moreover, she explained, the majority was wrong to suggest that *Humana* "require[s] a direct conflict with state law in order to compel preemption." Pet. App. 15a. Instead, she explained, "[i]t is enough that the federal law may 'interfere with a State's administrative regime[]'"– a "clear alternative" that the "majority seems to ignore." *Ibid.* (footnote omitted).

INTRODUCTION AND SUMMARY OF ARGUMENT

The McCarran Act embodies the federal government's longstanding commitment to preserving the traditional regulatory autonomy of the States over the insurance business. The Act advances this goal by directing that, as a general matter, federal laws not "specifically relate[d] to the business of insurance" shall not be "construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Nevertheless, in this litigation, a putative nationwide class action, the respondents are attempting to use the FHA (and other federal anti-discrimination statutes) that do *not* specifically target the business of insurance, to discredit and enjoin the practice of credit scoring – an important insurance rate-making tool that many States (including Texas, whose laws are most immediately implicated here) have chosen to permit.

Further review by this Court is warranted. As Allstate has persuasively demonstrated, this case satisfies all of the traditional criteria of certworthiness. It raises a question of federal law that is of great importance to insurers, policyholders, and state insurance regulators alike: whether the McCarran Act precludes the imposition of "disparate impact" liability in a putative federal class action lawsuit brought under the FHA (or, by extension, other federal civil rights laws), based on an insurance company's use of facially neutral risk factors in its underwriting and pricing decisions. Importantly, these decisions traditionally have been the subject of extensive regulation under state insurance laws. See Pet. 16-21. The Fifth Circuit's divided decision, moreover, deepens a conflict in the circuits over whether such disparate-impact liability contravenes the McCarran Act. See Pet. 25-28. And the lower court's conclusion that the McCarran Act presents no barrier to claims of this kind or to respondents' sprawling federal lawsuit is manifestly incorrect and reflects a fundamental misunderstanding of the statute. Pet. 22-25.

This is reason enough to grant Allstate's petition. But further review is also warranted for two additional reasons, which are described below. First, the decision below is at odds, in several important respects, with this Court's decision in *Humana*. And second, this case is an exceptionally good vehicle for clarifying the scope of the McCarran Act and thus bringing much-needed uniformity to the interpretation of this important federal statute.

ARGUMENT

I. The Fifth Circuit's Decision Ignores The Teachings Of *Humana*

As explained above (at 4-6), this Court in *Humana* carefully examined each of the operative terms of the McCarran Act – "invalidate," "supersede," and "impair" – and set forth a general framework for analyzing issues arising under the statute: "When federal law does not [1] directly conflict with state regulation, and when application of the federal law would not [2] frustrate any declared state policy or [3] interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." 525 U.S. at 309-10 (emphasis added). In addition to identifying three distinct ways in which the McCarran Act would preclude the application of a general federal law to the business of insurance, this Court clearly held that the term "impairs" extends beyond situations where federal and state law conflict.

Using this analytical framework, the Court then proceeded to examine carefully the liability standards, the procedural mechanisms, and the remedies available under Nevada law – and compared them with those available in the policyholders' RICO lawsuit. In so doing, the Court assessed the likely impact of the RICO lawsuit not only on individual Nevada statutes but also on the State's "comprehensive administrative regime" as a whole. 525 U.S. at 311-14.

The decision below ignores virtually all of these teachings. To begin with, as Judge Jones correctly noted in her dissent

(Pet. App. 17a & n.4; accord Pet. 11), the panel majority rested its decision in part on circuit cases pre-dating *Humana* that relied on an interpretation of the McCarran Act that *Humana expressly rejected*. See Pet. App. 5a-7a & n.4. Compare, *e.g.*, *Humana*, 525 U.S. at 309 ("[W]e reject * * * that Congress intended a green light for federal regulation whenever federal law does not collide head on with state regulation.") with *NAACP* v. *American Family Mut. Ins. Co.*, 978 F.2d 287, 295-96 (7th Cir. 1992) (holding that the McCarran Act bars application of federal law only where there is an actual conflict between state and federal law), cert. denied, 508 U.S. 907 (1993); *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995) (same), cert. denied, 516 U.S. 1140 (1996).[3] The majority's reliance on lower court decisions that, after *Humana*, no longer remain good law is at best perplexing and at worst indicative of a failure to grasp the import of *Humana*.

The panel majority also disregarded this Court's holding in *Humana* that "impair[ment]" occurs within the meaning of the McCarran Act when a generally applicable federal law "interfere[s] with a State's administrative regime" (525 U.S. at 310). At various points in its opinion, the majority appears "to ignore this clear alternative." Pet. App. 15a (Jones, J., dissenting); *id.* at 15a-16a n.3 (collecting examples). Thus, the majority states (incorrectly) that this Court in *Humana* "emphasized that [McCarran inverse] preemption is to be examined within a 'conflict preemption' rubric, and that, as such, the analysis will turn on one of two axes: (1) the existence of an

---

[3] The majority also relied heavily (see Pet. App. 6a) on *Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001), cert. denied, 122 S. Ct. 1608 (2002), a case that includes a short discussion of *Humana* but also relies on the Seventh Circuit's decision in *NAACP* without recognizing that the rationale of that case did not survive *Humana*. As Allstate points out (Pet. 25), *Moore* involved a claim not of disparate impact but of *intentional* discrimination (disparate treatment). Thus, *Moore*'s holding is not implicated by Allstate's petition.

express conflict with the letter of the state law; or (2) the frustration of an officially articulated state regulatory goal." Pet. App. 3a. In fact, *Humana* squarely held that the McCarran Act is *not* limited to a conflict preemption rubric, but rather extends as well to interferences with the State's administrative regime falling short of any actual conflict (or frustration of the purposes underlying state law). The majority's suggestion that McCarran Act "preemption" occurs "only * * * where there is a statutory or policy *conflict*" (Pet. App. 10a n.5 (emphasis in original)) is thus flatly inconsistent with an essential holding of *Humana*.

The majority also suggested that any argument that federal law interferes with "a mechanism" the State has "in place for regulating insurance contracts" would fail under *Humana* unless the challenger could identify "a particular state law" that was being impaired. Pet. App. 5a (internal quotations omitted). By "repeatedly, and incorrectly, demanding evidence of 'an enacted law' or 'a declared policy[]'" (Pet. App. 15a (Jones, J., dissenting)), the majority ignored this Court's instruction, in *Humana*, that courts should evaluate the likely impact of federal law on the state "administrative scheme" *as a whole*. And the majority ignored – or overlooked – the fact that this Court conducted just such an analysis in *Humana* itself. See, *e.g.*, 525 U.S. at 311-12 (examining Nevada's "comprehensive administrative scheme" and observing that it is "not hermetically sealed").[4] Had the majority examined the entirety of the Texas insurance scheme, it would have agreed with the dissenting judge that respondents' lawsuit will "interfere with the initial ratemaking as well as the corrective procedures utilized by" the State. Pet. App. 17a.

Finally, and most oddly, the panel's decision to permit this lawsuit to proceed ignores the stark fact that respondents'

---

[4] As if that were not enough, the majority's exclusive focus on "enacted laws" ignored this Court's examination, in *Humana*, of Nevada common and decisional law.

disparate-impact claim under the FHA – which seeks a declaration that credit scoring is illegal and an injunction against its future use in insurance pricing decisions – obviously will not only "impair" but also "invalidate" Texas's new statute authorizing the use of credit scoring under certain circumstances. See Pet. 7-9 & n.9, 11 n.13; Pet. App. 18a (dissent). In analogous cases involving federal preemption, it is well settled that state-law damages claims that are imposed for conduct that federal law expressly authorizes are preempted because they frustrate the purposes underlying federal law. See, *e.g.*, *Geier* v. *American Honda*, 529 U.S. 861 (2000); *Barnett Bank of Marion County* v. *Nelson*, 517 U.S. 25 (1996); *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982). The same is true here.

Whether viewed as inconsistencies with this Court's teachings in *Humana*, or simply as reasons why the decision below is wrong, these aspects of the majority's decision demonstrate why this Court's intervention is needed.

II. This Case Represents An Ideal Vehicle For Resolving Issues Left Open In *Humana* And Clarifying The Scope Of The McCarran Act

Humana turned out to be exceedingly easy case to resolve under the legal framework announced by the Court in that case. The reason is straightforward: The standards of conduct, procedures, and remedies involved in the underlying RICO lawsuit in *Humana* were strikingly similar to the substantive standards, procedures, and remedies available under Nevada law. See 525 U.S. at 311-14. Federal and state regimes both prescribed exactly the same standard of conduct (prohibiting fraud by an insurer against a policyholder). Moreover, both regimes contemplated private civil actions as a means of targeting the proscribed conduct. And both regimes allowed the recovery of extraordinary damages. While RICO authorizes private parties to recover treble damages (18 U.S.C. § 1964(c)), Nevada law authorized the recovery of punitive damages (including in excess of three times compensatory damages).

Given these similarities, this Court had no difficulty concluding that Nevada's approach to policing insurance fraud was in no way frustrated – but instead was "complement[ed]" and "advance[d]" (525 U.S. at 313-14) – by allowing the RICO action to proceed. Precisely because *Humana* turned out to be such an easy case to resolve against McCarran Act preclusion, it left important questions unresolved about the reach of Section 2(b) and the meaning of "impairment." More specifically, this Court had no occasion in *Humana* to explain when material differences in federal and state standards of conduct, procedural mechanisms, or available remedies would rise to the level of an "interfere[nce] with a State's administrative regime" under the McCarran Act. 525 U.S. at 310.

This case is an ideal vehicle for addressing this question and, in so doing, bringing greater clarity and uniformity to this important area of federal law. To begin with, the fact that this is a putative nationwide class action means that, unlike in *Humana*, this case involves more than the insurance laws of a single State. That, in turn, means that this case presents a range of different scenarios with respect to the disparities between the (1) relevant standards of conduct, (2) procedural mechanisms, and (3) remedies that respondents seek in this federal lawsuit and those available under state law.

Moreover, with respect to Texas law alone, this case presents far greater differences than existed in *Humana* between the state and federal standards of conduct, procedural mechanisms, and remedies. Thus, this case is an excellent vehicle for illuminating how differences in all three features should be analyzed under the McCarran Act.

1. *The Standards of Conduct.* In contrast to *Humana*, the conduct challenged in respondents' federal lawsuit has *not* been proscribed by state law. Indeed, as noted above, in 2003 Texas joined the majority of States that have expressly *endorsed* the practice of credit scoring, by enacting insurance reform legislation that permits insurers to use credit scoring as one mechanism for determining the risk of loss and thus for setting

reasonable insurance premiums. See Tex. Ins. Code. art. 21.49-2U. Although credit scoring cannot be the sole basis for making a decision on an application, Texas now clearly allows the practice, so long as its use is disclosed to applicants and several other regulatory conditions are satisfied. See *ibid.*; Pet. 9 & n.9.

This carefully balanced regulatory approach differs markedly from the full-scale attack on credit scoring that is the centerpiece of the present litigation. Respondents' central allegation is that credit scoring, although facially race-neutral, has a discriminatory impact on non-Caucasians, and as such violates federal anti-discrimination law. Cplt. ¶¶ 91-96. Accordingly, they seek damages for past uses of the practice as well as an injunction proscribing Allstate from using credit scoring to evaluate risk and set the price of their insurance products in the future. As explained above (at 12), it is difficult to imagine a clearer example of a general federal statute "invalidating" state insurance law.

Moreover, even insofar as respondents seek damages based on conduct that occurred before 2003, Texas's previous regulatory approach is not compatible with the goals of this litigation. At the time this suit was filed, the State did not prohibit the use of credit scoring. Instead, it took an entirely laissez-faire attitude toward the practice, leaving insurers presumptively free to use the practice as they saw fit. And, although the State forbade (as it still does) intentional discrimination in insurance practices on the basis of race, color, and national origin, see Tex. Ins. Code art. 21.21-6, there is simply no indication that state law similarly proscribes unintentional disparate impact discrimination of the sort alleged here. See Pet. 18-19. The fundamental difference between proscribing conduct (as Nevada did with respect to insurance fraud) and not regulating conduct at all (as Texas did here) takes respondents' suit well outside of the rationale of *Humana*.

Indeed, unless and until a state regulator actually declares a practice like credit scoring illegal, it cannot be said that the

"acts the policy beneficiaries identify as unlawful under [federal law] are also unlawful under [state] law." *Id.* at 308. Use of the FHA to brand as unlawful insurance practices that a State has allowed to develop unimpeded would certainly appear to "interfere with a State's administrative regime" in a way objectionable under the McCarran Act. 525 U.S. at 310. This important question, which was not (and could not be) definitively resolved in *Humana*, is present here and warrants this Court's attention.

2. *The Procedural Mechanisms.* Even if Allstate's use of credit scoring might have raised issues under Texas law prior to 2003, that practice could *not* have been challenged through a private civil action. It is clear that Article 21.21-6, the provision of the Texas insurance code that proscribes race and national origin discrimination, does not allow private rights of action of any sort. See *Perez ex rel. Perez* v. *Blue Cross Blue Shield of Texas, Inc.*, 2003 WL 22964281, at *5-6 (Tex. Ct. App. Dec. 18, 2003); see also Pet. 18-19 & n.18. Instead, Texas law sets forth an exclusive system of public administrative redress whereby the State insurance commissioner is empowered to take legal action against insurers engaged in discriminatory practices. See Tex. Ins. Code art. 21.21-6, § 5(a); *id.* arts. 82.001-83.153. In this way, the State has decided to limit the power of courts – and certainly of juries – to sit in judgment of the actuarial judgments of insurers.

And where a State has chosen to resolve claims of discriminatory rate-making through an administrative process that rules out private civil suits, a federal class-action lawsuit alleging such discrimination plainly interferes with, and weakens, the State's administrative scheme.[5] In effect, the lay jury would be

---

[5] Certainly, the Texas administrative scheme does not contemplate anything like a nationwide class action. Instead, like any state insurance regulatory regime, Texas's process is narrowly concerned with conduct within the State's own borders, which allows regulators to focus their attention on specific pricing practices and their compatibility with State

asked to apply general federal law to evaluate – and second-guess – the decisions of insurance regulators across the country to approve insurance rates calculated using credit scoring techniques. This represents a direct federal intrusion into regulatory prerogatives that the McCarran Act reserves to the States.[6]

It was for this reason that the *Humana* Court placed importance on the fact that Nevada did provide a private right of action for insurance fraud claims. The existence of such actions, the Court observed, "dilutes the force" of the assertion made by an *amicus* that making private RICO actions available would "cause insurers to be reluctant to settle with state commissioners to avoid compromising defenses" in federal litigation. 525 U.S. at 312 n.10. Here, by contrast, the *absence* of state litigation analogous to the federal suit brings that concern directly to the fore. If insurers face the threat of being sued under federal law based on the disparate impact of their facially neutral rate-making tools, the task of state regulators attempting to set the terms by which such tools can be used – and to take administrative action where they are misused – becomes considerably more difficult.

The Fifth Circuit recognized that Texas law would not allow private damages actions, but inexplicably and improperly dismissed that as irrelevant to the McCarran analysis. Pet. App. 12a (rejecting this argument because "it is well-settled that the

---

law and policy. They need not consider the practices of other jurisdictions – as the jury here would be charged with doing were the proposed class certified. This further highlights the vast differences in substance and procedure between this putative federal class action and the remedies available under state law.

[6] As this Court has recognized, jury verdicts have just as much of a regulatory effect as state statutes or administrative regulations. See *Cipollone* v. *Liggett Group Inc.*, 505 U.S. 504, 521 (1992); cf. *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

existence of additional remedies does not create a conflict with state law such that McCarran preemption may be found"). This analysis is misguided in at least two respects. First, this Court in *Humana* expressly rejected the notion that merely the absence of a "conflict" between federal and state law precludes McCarran Act preemption. See 525 U.S. at 309. By focusing solely on whether the presence of private action created a conflict, the Fifth Circuit asked the wrong question.

Second, the court of appeals also seriously overread *Humana*. To be sure, *Humana* does say that federal regulation of insurance is not precluded merely because it attaches additional liability. *Ibid.* It does *not* follow, however, as the Fifth Circuit suggested, that the authorization of a private federal action where no analogous state law action exists is categorically immune from scrutiny under the McCarran Act. In context, this Court's observation was intended to preserve the federal government's authority to impose taxes or fees on insurers beyond those assessed by the States, a decision that hardly affects the States' own regulatory schemes. The disruption is far greater, however, when the federal government trenches upon a State's exclusive power to police the business of insurance by giving private litigants the power to do what the State had previously reserved to its own regulators. Private federal lawsuits strip the States of their ability to set enforcement priorities through the exercise of prosecutorial discretion and encourage citizens to bypass the state administrative process. This represents a fundamental shift in the nature and quality of insurance regulation, which implicates the core concerns of the McCarran Act.

In any event, since *Humana*, most courts that have confronted the question whether federal lawsuits "impair" state insurance regimes that do not allow for private rights of action to challenge insurer conduct have disagreed with the position taken by the Fifth Circuit in this case. See, *e.g.*, *LaBarre* v. *Credit Acceptance Corp.*, 175 F.3d 640, 643 (8th Cir. 1999) (RICO claim preempted by the McCarran Act because Minne-

sota insurance law allowed only "administrative recourse" and not a private civil action); *In re Managed Care Litigation*, 185 F. Supp.2d 1310, 1321 (S.D. Fla. 2002), 150 F. Supp. 2d 1330, 1340 (S.D. Fla. 2001) (RICO claims barred by the McCarran Act where analogous state insurance regime offered no private right of action); *Am. Chiropractic Ass'n, Inc.* v. *Trigon Healthcare, Inc.*, 151 F. Supp. 2d 723 (W.D. Va. 2001) (same); *Wineinger* v. *United Healthcare Ins. Co.*, 2000 WL 1277629, at *7-8 (D. Neb. Feb. 16, 2000) (same). This Court's grant of review in this case would allow clarification of this important subsidiary question and resolve the split created by the Fifth Circuit's unreasoned decision.

3. *The Remedies*. The *third* important divergence between federal and state law in this case concerns the far-reaching remedies that respondents are seeking. Under Texas law, the insurance commissioner pursuing a discrimination claim may seek administrative orders directing an insurer to return the premium to a policyholder, to pay restitution, or to cease and desist from certain practices. The commissioner may also levy regulatory fines or suspend an insurer's license. In this suit, however, respondents are seeking much more: nationwide preliminary and permanent equitable relief, enjoining the use of credit scoring wherever Allstate uses it; reformation of existing insurance contracts, attorneys' fees, litigation costs, and – perhaps most importantly – punitive damages. See C.A. ER 16-21. By contrast, in *Humana*, plaintiffs were seeking only treble damages against a state law backdrop that allowed private plaintiffs to recover punitive damages in excess of three times the amount of the compensatory award. Because the divergence of remedies here is vastly greater than in *Humana*, this case presents the Court with a valuable opportunity to clarify the circumstances in which remedial differences rise to the level of an impairment under the McCarran Act.

* * *

Because this case is a putative nationwide class action, respondents are seeking to challenge the use of credit scoring

not merely in Texas, where the suit was filed, but in every State where Allstate does business. The obvious aim of this suit is to impose a blanket federal prohibition on credit scoring – by means of litigation rather than legislation – that would wholly supplant the decisions of state regulators regarding this particular rate-making tool. This is altogether inappropriate. Whether or not credit scoring is (as many States have concluded) an important actuarial tool, Congress enacted the McCarran Act precisely to protect the authority of the States against such inadvertent federal incursions.

The effect – and indeed the purpose – of litigation such as this is to transfer control over this critical aspect of the insurance business from expert State regulators to plaintiffs' lawyers, federal judges, and lay juries. By devolving regulatory authority from professional rate-makers – who are charged with considering *both* the public's interest in fair and non-discriminatory insurance practices as well as the industry's need for sound actuarial devices that accurately measure risk and thereby keep rates fair for everyone – to lawyers and jurors, who are charged only with considering the facts of a particular case, lawsuits such as this can only make regulation less predicable and more expensive.[7]

---

[7] Two related reasons make this devolution particularly worrisome. First, respondents' lawsuit is a collateral attack on the rate-making process. As this Court has often observed, "[r]ate-making is essentially a legislative function." *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 589 (1945). It requires the decisionmaker to "survey the field" and to "regulate based on a full view of the relevant facts and circumstances." *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 366 (1994). Accordingly, courts "are scarcely equipped to oversee, without the initial superintendence of a regulatory agency, rate structures and practices." *Ibid.* For precisely that reason, many States recognize the "filed rate" doctrine, which precludes judicial reexamination of duly filed rates and tariffs. Second, the "relation of insured to insurer" and "the underwriting and spreading of risk" lies at the very "core of the McCarran-Ferguson Act's concern." *Barnett Bank of Marion County* v. *Nelson*, 517 U.S. 25, 39 (1996); *Royal Drug*, 440 U.S. at 218 n.18, 221; see also note 2, *supra*; Pet. App. 18a (Jones, J., dissenting).

If permitted to proceed, the present litigation would require a single federal court to wade through oceans of actuarial and statistical data in order to assess whether the practice of credit scoring is required by business necessity in any of the States where it is used by Allstate and, if so, whether there is an alternative available under the pricing systems in place in the fifty States that would have a less disparate impact. By its very nature, this gargantuan task would not involve the careful, state-specific focus that expert insurance regulators take when considering whether and under what conditions to allow particular rate-making techniques within their borders. Such a fundamental displacement of regulatory perspectives and prerogatives ought to count as an impairment of state regimes.

When a single federal class action threatens to undermine the multitudinous decisions that individual States have made (or are considering making) about the propriety of a ratemaking practice, the fundamentally decentralized character of American insurance regulation is destroyed. Such an accidental yet profound shift in the federal-state balance of power offends the core purpose of the McCarran Act and subverts the important federalism values the Act was enacted to protect.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ROBIN S. CONRAD
STEPHANIE A. MARTZ
National Chamber Litigation Center, Inc.
1615 H Street
Washington, D.C. 20062
(202) 463-5337

ALAN E. UNTEREINER*
BRIAN M. WILLEN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

MARCH 2004